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Supreme Court of the United States

October Term, 1978

Nos. 78-432, 78-435 and 78-436

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioners,

—v.—

BRIAN F. WEBER, et al.,
Respondents.

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

—v.—

BRIAN F. WEBER,
Respondent.

UNITED STATES OF AMERICA and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

—v.—

BRIAN F. WEBER, et al.,
Respondents.

BRIEF *AMICI CURIAE* OF THE AFFIRMATIVE ACTION COORDINATING CENTER, THE NATIONAL CONFERENCE OF BLACK LAWYERS, THE NATIONAL LAWYERS GUILD, THE CENTER FOR CONSTITUTIONAL RIGHTS, THE CENTER FOR URBAN LAW, THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, THE ASIAN LAW CAUCUS, THE BLACK AMERICAN LAW STUDENTS ASSOCIATION, INC., THE INDIAN LAW RESOURCE CENTER, THE LA RAZA LEGAL ALLIANCE, THE LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, THE NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE, THE NATIONAL PUERTO RICAN LAW STUDENTS ASSOCIATION and THE NATIONAL COUNCIL OF CHURCHES OF CHRIST

VICTOR GOODE
Affirmative Action Coordinating Center
c/o National Conference of Black Lawyers
126 West 119th Street
New York, New York 10026

JACK P. HARTOG
National Lawyers Guild
853 Broadway, Suite 1705
New York, New York 10003

ARTHUR KINOY
DORIS PETERSON
c/o Center for Constitutional Rights
853 Broadway, Suite 1401
New York, New York 10003
(212) 674-3303

ELIZABETH A. RODGERS
Shubow, Stahlin and Bergstresser, Inc.
294 Washington Street
Boston, Massachusetts 02108

JEANNE MIRER
Center for Urban Law
Wayne County Neighborhood Legal Services
3550 Cadillac Tower
Detroit, Michigan 48226

Attorneys for *Amici Curiae*

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INTEREST OF AMICI */

The Affirmative Action Coordinating Center (AACC) **/ is an organization created by the National Conference of Black Lawyers (NCBL), the Center for Constitutional Rights (CCR) and the National Lawyers Guild (NLG) with participation by a cooperating network of civil rights, civil liberties, and other organizations. Many network organizations as well as other organizations have joined as amici in this brief.

The AACC was created in response to the proliferation of attacks on affirmative action programs. Its purposes are to stimulate and coordinate resources and legal strategies for the defense and expansion of affirmative action programs. The AACC

*/ This brief is filed with the consent of the parties. The letters of consent have been filed with the Clerk of the Court.

**/ The AACC is located at 126 West 119th Street, New York, New York 10026.

has convened a roundtable of civil rights attorneys to examine the meaning and implications of this Court's recent decision in Regents of The University of California v. Bakke, ___U.S.___, 98 S. Ct. 2733 (1978). It is producing an informational newsletter on nationwide affirmative action developments in education and employment. It has installed a national "hotline" to receive and dispense information on affirmative action developments. It is preparing several educational publications on affirmative action in education and employment. The AACC is planning other activities designed to increase communication and joint efforts among all groups and individuals interested in strengthening effective affirmative action programs.

In addition to its current activities with the AACC, each sponsoring organization draws from a rich history of activities supporting civil rights.

The National Conference of Black Lawyers (NCBL) is the most progressive legal organization in the Black community. Throughout its history, NCBL has responded to legal and social issues of special impact on Black people. In 1972, NCBL established a task force on legal education to address the issue of racism in the legal profession. This task force filed a brief in defense of minority admissions programs in the case of DeFunis v. Odegaard, 416 U.S. 312 (1974), and in September, 1977, began to develop a comprehensive national strategy on the Bakke decision. The NCBL, together with the National Lawyers Guild, conducted summer research projects on affirmative action in 1977 and 1978.

The National Lawyers Guild (NLG) was founded in 1937 as a multi-racial and progressive alternative to the racially restrictive and conservative American Bar

Association. Its historical commitment to civil rights dates back to efforts to eliminate the poll tax and white primaries. In 1962 the Guild dedicated its full resources to the legal support of the civil rights movement. In support of affirmative action, the Guild filed briefs as amicus curiae throughout the course of the Bakke litigation and in 1977 joined with the NCBL to co-sponsor a Bakke amici roundtable attended by forty organizations.

The Center for Constitutional Rights (CCR) was born of the civil rights movement and the struggles of Black people in the United States for true equality. CCR attorneys have been active in cases involving voting rights, jury composition, community control of schools, fair housing and employment discrimination. They have litigated and done educational work designed to protect and make meaningful the constitutional and stat-

utory rights of women, Blacks, Puerto Ricans, Native Americans and Chicanos when such groups were attempting to reverse the effects of centuries of discrimination.

The Center for Urban Law, Wayne County Neighborhood Legal Services, represents persons in the Detroit metropolitan area. Its client population is composed of numerous racial and ethnic minorities unable to afford the price of conventional legal services. A large percentage of this client population is non-white and the historical victims of societal and institutional racism. Many of the clients are unemployed, underemployed, and frustrated by the employment market. Voluntary affirmative action programs of the nature instituted by the appellants have aided this client population by opening a small avenue to secure employment and other benefits. To withdraw the benefits of

these affirmative action plans just as small yet significant gains are occurring will have a devastating effect on them.

The Asian American Legal Defense and Education Fund (AALDEF) is a national organization based in New York, committed to defending the civil rights of Asian Americans through litigation and education. The issues in this case have broad significance for the Asian American community. Historically, Asian Americans have been confined to areas of employment such as restaurants, laundries and garment factories. Employment for minorities, particularly Asian Americans, requires affirmative action in recruitment and training programs to rectify past and present discrimination.

The Asian Law Caucus, with headquarters in San Francisco, is a Bay Area community organization and law office committed to protecting the civil rights of Asian Americans through litigation and education, especially among low and moderate income people.

The Black American Law Students Association (BALSA) is the representative organization of Black law students in the nation. BALSA is designed to address the concerns and interests not only of Black law students but also of the surrounding minority community. BALSA has combined these goals in a varied schedule of programs which seek to eliminate societal racial discrimination.

The Indian Law Resource Center is an educational and charitable organization based in Washington, D.C., devoted principally to the protection and enhancement of the legal rights of American Indians. One of the purposes of the Center is to seek the elimination of racial discrimination through education and legal efforts. Essential to this effort is the concept of "special measures" and affirmative action. For many years the federal government has established and implemented, albeit

imperfectly, the policy of "Indian preference" regarding employment of Indian persons by various federal agencies. The Center is vitally interested in the protection and continuing affirmation of the Indian preference policy and other measures, such as affirmative action, designed to overcome the continuing social and economic discrimination experienced by American Indians and other non-white people.

La Raza Legal Alliance (LRLA), is a national organization composed of Latino lawyers, law students and legal workers dedicated to the realization of social, economic and political equality for all Latinos. Its goal is to promote and to protect the rights of Latino people and thereby, all peoples, to a decent standard of living, a high quality of education, decent housing and equal employment opportunities.

Law Students Civil Rights Research Council (LSCRRC), is a law student organization which seeks to respond to the needs of minority and poor people in all areas of the United States. Since its inception in 1963, it has assisted the efforts of every major civil rights, civil liberties, and public interest law organization. In 1976, the LSCRRC Board of Directors mandated a sharper organizational focus on the problems surrounding affirmative action/minority admissions. The theme for its National Convention in October, 1978 was the Crisis in Minority Admissions. It has also co-sponsored two regional minority admissions conferences during the 1976-77 year, and has sponsored several LSCRRC interns working on projects concerning affirmative action in the last two summers.

The Mexican American Legal Defense and Educational Fund (MALDEF) was established on May 1, 1968, primarily to provide legal assistance to Mexican Americans. Its headquarters are in San Francisco with additional offices in San Antonio, Los Angeles, Denver, and Washington, D.C. One of its three major areas of litigation has been employment discrimination. To this end MALDEF has litigated to decision numerous employment cases and has negotiated consent agreements similar to the one at issue.

The National Emergency Civil Liberties Committee (NECLC) was founded in 1951 for the purpose of reestablishing the constitutional freedoms then under severe attack. For 27 years, NECLC has pursued this goal through numerous test cases to vindicate the civil liberties and civil rights of citizens, including many such cases before this Court. It has also engaged in extensive educational activities in support of the constitutional rights of citizens.

The National Puerto Rican Law Students Association (National PRLSA) is the organization established by Puerto Rican and other Latino law students to represent the concerns and needs of its people before the national legal and educational communities. National PRLSA is specifically committed to the increased recruitment and admission of Puerto Ricans and other Latinos into law schools, the strengthening of our local organizations at all law schools, and the development of positive working relationships with Latino lawyers, legal workers, community organizations and undergraduate groups across the nation. National PRLSA's specific concerns emanate from its solidarity with the struggles of all minority, poor and underrepresented people of the United States to attain and preserve full socio-economic and political equality.

The National Council of Churches of Christ in the United States of America (NCC) is the cooperative agency of thirty national Protestant and Eastern Orthodox religious denominations with an aggregate membership of over forty million people. It is organized exclusively for religious purposes and is committed to promoting the application of the law of Christ in every sphere of human relations.

The Council has been active in the civil rights effort since its inception in 1950 and has filed briefs amicus curiae with this Court in several historic cases, including Jones v. Mayer (1968) and Regents v. Bakke (1977). Because its Governing Board has repeatedly supported affirmative action to eliminate the disadvantage engendered by discrimination, the Council joins this brief to urge the Court to uphold voluntary programs of affirmative action in employment.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIII.

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

SUMMARY OF ARGUMENT

This case reaches beyond the particular affirmative action plan at Kaiser's facilities in Gramercy, Louisiana. It threatens the national affirmative action plan adopted throughout the aluminum industry. It endangers the future of all

similarly negotiated, or where there is no union, unilaterally initiated affirmative action plans. Consequently, the case affects the vital interests of minorities and women to end their systematic exclusion from employment opportunities which this country has historically reserved for whites and men.

Affirmative action is a concept which recognizes that in the United States, discrimination on the basis of race, sex and national origin has been and continues to be so pervasive and so engrained in the institutions of this country that remedial policies which take race, sex or national origin into account are critical to achieving actual equal employment opportunity. Stated simply, affirmative action recognizes the existence of institutional discrimination in this country and is a tool to overcome it.

This Court has repeatedly recognized that we are "a Nation confronting a legacy of slavery and racial discrimination" and that there has been "a lengthy and tragic history" of societal discrimination against Blacks arising out of slavery. Regents of the University of California v. Bakke, supra, at 2750, 2755 (Opinion of Powell, J.).

The courts have contributed directly to this tragic history. In the late nineteenth century, "The Equal Protection clause was '[v]irtually strangled in its infancy by post-Civil War judicial reactionism.'" Id. at 2749 (Opinion of Powell, J.). This "Court strangled Congress' efforts to use its power to promote racial equality." Id. at 2800 (Opinion of Marshall, J.). Not only did the courts undermine legislation, but they also curtailed the protections of the Constitution.

As a result, the relics of chattel slavery continue to exist in the form of judicially sanctioned white supremacy, which until twenty-four years ago tolerated de jure segregation in all aspects of American life.

In the instant case, the logic advanced by the lower courts repeats the tragic history of the late nineteenth century. Their post war on poverty judicial reactionism would strangle in their infancy the laws governing employment discrimination. Once again the courts are being used to create a facade of equality which in fact prevents the elimination of institutionalized discrimination against non-white minorities.

A result in this case which creates the legal fiction of discrimination against whites would create a barrier to the desperately needed efforts to eliminate institutional discrimination. Such a result, amici contend, would deprive the petitioners and minority employees at the Kaiser plant in Gramercy, Louisiana, of the protection which the Thirteenth Amendment affords voluntary efforts to eliminate the badges and incidents of slavery manifested in present discriminatory employment relations.

REASONS FOR GRANTING THE WRIT

I. THE THIRTEENTH AMENDMENT PROTECTS THE RIGHT OF AN EMPLOYER AND UNION TO CONSIDER RACE IN THE SELECTION OF EMPLOYEES FOR PARTICIPATION IN A NEW CRAFT TRAINING PROGRAM ESTABLISHED TO OVERCOME THE BADGES OF SLAVERY INHERENT IN THE EXCLUSION OF MINORITIES FROM CRAFT EMPLOYMENT.

A. The Underrepresentation Of Minorities In The Skilled Crafts Is A Relic Of Slavery.

Amici contend that institutionalized racial discrimination against all non-white minority people has its historical

roots in slavery.*/ In Jones v. Alfred H. Mayer Co., 392 U.S. 409, 442-43 (1968), this Court found that "herding men into ghettos" was a "relic of slavery." Amici believe that the underrepresentation of non-white minorities in the skilled crafts across this country is similarly "a relic of slavery."**/ Such present day discrimination both reflects and perpetuates the theory used to justify slavery: white supremacy.

Although slavery was ended after the Civil War by the Thirteenth Amendment, white supremacy as a reality and an idea was not. Amici assert that the Thirteenth

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*/ When amici refer to institutionalized racial discrimination, they refer to the phenomenon whereby the nation's institutions almost reflexively grant advantages to whites and impose disadvantages upon Blacks and other minority people of color. See J. Feagin and C. Feagin, Discrimination American Style: Institutional Racism and Sexism, Chap. 1-3,6 (1978).

**/ "Judicial findings on discrimination in crafts are so common as to make it a proper subject for judicial notice." Weber v. Kaiser Aluminum, 563 F. 2d at 216, 235-36 n.12 (Wisdom,J., dissenting).

Amendment intended not only to abolish slavery but also to reject all of slavery's "badges and incidents." Civil Rights Cases, 109 U.S. 3, 20 (1883). In order to accomplish this objective, the Thirteenth Amendment had to overrule and repudiate the statements of law and policy sanctioning slavery in Dred Scott v. Sandford, 60 U.S. (19 How.) 393(1856). That infamous case elevated to the level of constitutional doctrine the now discredited theory of the racial inferiority of the slave race. The Thirteenth Amendment, therefore, not only rejected slavery but the doctrine of white supremacy which had been generated to rationalize the subordination of an entire group of people. See generally, Kinoy, The Constitutional Right of Negro Freedom, 21 Rutgers L. Rev. 387 (1967).

Despite the passage of the Fourteenth and Fifteenth Amendments and numerous civil rights laws, badges and incidents of slavery

persisted as new substitutes for that illegal institution. One example of such a substitute for slavery was the deprivation to the former slaves of the right to make employment contracts. The right to make and enforce such contracts is one of the "fundamental rights which are the essence of civil freedom." Civil Rights Cases, supra at 29; Jones v. Alfred H. Mayer, supra at 441 n. 78. "The enjoyment or deprivation of [such rights] constitutes the essential distinction between freedom and slavery." Civil Rights Cases, supra at 30.

Even in the Civil Rights Cases, the Court recognized that disabilities to the "fundamental right to contract" were necessary incidents of slavery:

> The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents...[D]isability to... make contracts ... and such like burdens and incapacities were the inseparable incidents of the institution. Id. at 29.

It would be ironic in the extreme if, 95 years after the Civil Rights Cases, the Court were now to disapprove contractual freedom when that freedom is utilized to overcome discrimination against the present day victims of white supremacy.

The deprivation of this right to contract was an outgrowth of and substitute for slavery and white supremacy. Cf. Jones v. Alfred H. Mayer Co., supra at 441-42. The exclusion of Blacks and other non-white minorities from the skilled trades, like slavery itself, stamps the excluded groups as inferior to whites. It reinforces the fiction that they are incapable of performing skilled work and reaffirms the white supremist status quo which cannot tolerate Blacks and other non-white minorities being trained to hold positions in which they are superior to whites. Current racial segregation of the workforce, like racial segregation of residential ghettos,

is a "relic of slavery." Jones v. Alfred H. Mayer Co., supra at 442-43.

B. Title VII And Executive Order 11246 Must Be Interpreted Consistently With The Thirteenth Amendment.

Although Title VII was not passed pursuant to the Thirteenth Amendment, the time-honored principles of this country's constitutional government require the courts to interpret all statutes and executive orders consistently with the provisions of the Constitution. If a statute or executive order is inconsistent with any portion of the Constitution, or if it is applied in such a manner as to be inconsistent with the Constitution, then it cannot stand. Marbury v. Madison, 5 U.S. 103 (1803).

Title VII, therefore, cannot be constitutionally interpreted by this Court unless the interpretation it is given fully effectuates the mandates of the Thirteenth Amendment. Similarly, under Executive Order

11246, the Presidential power to further federal interests in the procurement of goods or services must include the power to implement the mandates of the Thirteenth Amendment.

Furthermore, the Thirteenth Amendment is self-executing; it requires no implementing legislation for its enforcement:

> By its own unaided force and effect, the Thirteenth Amendment abolished slavery, and established universal freedom. Civil Rights Cases. Jones v. Alfred H. Mayer Co., supra at 439.

Because the Thirteenth Amendment is self-executing, it automatically becomes the context within which civil rights legislation must be interpreted.*/

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*/ The Thirteenth Amendment reaches private employment contracts and justifies prohibitions against racial discrimination in that context. Johnson v. Railway Express Agency, 421 U.S. 454, 459-60 (1975); Jones v. Alfred H. Mayer Co., supra at 441 n. 78. While these cases upheld Congressional legislation which may be appropriate under the Thirteenth Amendment, the Thirteenth Amendment did not require legislation. It was "an absolute declaration that

footnote continued on next page.

Because the interpretation of Title VII and Executive Order 11246 advanced by the courts below hinders the achievement of the objective of the Thirteenth Amendment to eliminate the badges and incidents of slavery, it cannot be sanctioned by this Court and must be rejected.

C. Consistent With The Thirteenth Amendment, Voluntary Elimination Of The Effects of Past Discrimination Has Been Urged As A Public Policy Of The Highest Priority.

Under Title VII this Court has sanctioned racially conscious changes in seniority systems:

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slavery shall not exist in any part of the United States." Civil Rights Cases, supra at 28.

Our belief that the necessity of doing away with the badges of slavery requires findings that do not put unnecessary barriers in the path of minority litigants pursuing the right to be free of discrimination in an employment setting. See Davis v. City of Los Angeles, 566 F. 2d 1334 (9th Cir. 1977), cert. granted 46 U.S.L.W. 3775, awaiting oral argument.

> The Court has...held that a collective bargaining agreement may ...enhanc[e] the seniority status of certain employees for purposes beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement. Franks v. Bowman Transp. Co., Inc., 424 U.S. 747, 778-79 (1976).

Kaiser and the Steelworkers voluntarily instituted the racially conscious seniority system here to further the compelling national interest in eliminating the present effects of past racial discrimination, an interest which this Court explicitly endorsed in Franks:

> [T]he ability of the union and employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of the 'highest priority' is certainly no less than in other areas of public policy interests. Franks v. Bowman Transp. Co., Inc, supra at 779. */

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*/ These principles,on the ability of unions and employers to reach agreement furthering the public

footnote continued on next page.

Thus, in Franks, this Court has interpreted Congressional intent to permit voluntary affirmative action under Executive Order 11246 and Title VII to further the high public policy of eliminating the current inequalities stemming inexorably from endemic past inequalities.

Furthermore, Justices Brennan, White, Marshall and Blackmun in Regents of the University of California v. Bakke, supra, have explicitly recognized the validity of this interpretation of Title VII:

> Although Title VII clearly does not require employers to take action to remedy the disadvantages imposed upon racial minorities by hands other than their own, such an objective

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policy objective of eliminating racial discrimination, are directly applicable to this case. Amici, however, would note their agreement with Judge Wisdom, who stated in his dissent in Weber: "The program stands or falls on its separation of workers into two racial pools for assignment to job training. The way that workers are then selected from within those pools [by seniority] is irrelevant. supra at 235 (Wisdom, J., dissenting).

> is perfectly consistent with the remedial goals of the statute. Id. at 2775 n. 17.
>
> Thus, our cases under Title VII ... have held that, in order to achieve minority participation in previously segregated areas of public life, Congress may require or authorize preferential treatment for those likely disadvantaged by societal racial discrimination. Id. at 2787.

Congressional support for this view was clearly established in 1972, when Congress rejected an amendment to Title VII, which would have prohibited such affirmative action. (See Petition of the United States, et al. at 15-16; see also German v. Kipp, 429 F. Supp. 1323 (W.D. Mo. 1977); Cong. Rec. 1662-1674, Jan. 28, 1972, id. at 3369, Feb. 9, 1972. H.R. No. 92-2 8, U.S. Code and Admin. News, 1972 Vol. 2, 2150-52, 2172. */

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*/ Title VII has also been recognized as furthering the important interests of interracial associations. Whites are permitted to protest and recover damages for deprivation of interracial associations. Waters v. Heublein, 547 F. 2d 466, 469-70 (9th Cir. 1976); EEOC v. Bailey, 536 F. 2d 439, 452-54 (6th Cir. 1977); cf. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205,209-210(1972).

The right of all persons in the United States voluntarily to abolish the badges and incidents of slavery is consistent with the opinion of this Court in Barrows v. Jackson, 346 U.S. 249 (1953). In Barrows, property interests of whites seeking to enforce racial restrictions on property were set aside in order to vindicate important constitutional rights. Accord, Sullivan v. Little Hunting Park, 296 U.S. 229, 237 (1969). It has been held that whites have the right to raise the rights of Blacks "defensively as a bar to judgment against [them]." Warth v. Seldin, 422 U.S. 490, 500 n. 12, 510 (1975). Similarly, the employer and the union here should be allowed to raise defensively their right voluntarily to eliminate the badges and incidents of slavery under the Thirteenth Amendment.

The broad public policy encouraging remedial action aimed at widespread social and economic discrimination has its corollary in the area of women's rights. The judiciary has interpreted statutes to remedy societal discrimination against women and to reduce the disparity in economic conditions caused by that societal discrimination as being constitutional under the Fourteenth Amendment. Califano v. Webster, 430 U.S. 313 at 315-16 (1977). Thus, even apart from the Thirteenth Amendment context, this Court has recognized the critical importance of measures designed to overcome this nation's heritage of past discrimination.

D. The Thirteenth Amendment, Because It Reconciles Competing Legal Doctrines Regarding Racial Discrimination, Compels Judicial Approval Of The Voluntary Affirmative Action Program Challenged Herein.

Title VII creates rights for all persons to be free of employment discrimination based on race, color, religion, sex or national origin. This principle, and its parallels in other civil rights laws, did not appear on the legal landscape simply due to abstract notions of natural justice. It was passed against a factual backdrop of an aroused citizenry who no longer would tolerate systematic, pervasive and unabashed discrimination against the descendants of this nation's slaves. Although this country's race relations have undergone some positive changes since the great push for civil rights in the 1960's, overt racism still persists; covert racism is still widely

practiced; and basic ignorance of the reality of racism still flourishes. Furthermore, the effects of these past and continuing white supremacist attitudes and practices are all too apparent in any review of social and economic indicators of equality.*/

The concept of affirmative action has emerged as a critical means for remedying these many current expressions of this nation's history of slavery, white supremacy and discrimination. It is a remedial tool responding directly to this historic, negative and stigmatic use of race.

The ruling of the court below denies this history. Its premise is that all discrimination is the same, despite historical reality to the contrary. All discrimination, however, is not the same. White people simply have not, do

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*/ See, e.g. United States Commission on Civil Rights, Social Indicators of Equality for Minorities and Women (August, 1978).

not, and will not suffer from the affirmative use of race in ways which should cause this Court to restrict affirmative action programs.

Amici contend that while respondents have rights under Title VII and Executive Order 11246,*/ respondents' rights do not outweigh a constitutional protection afforded the petitioners pursuant to the Thirteenth Amendment to implement the affirmative action plan challenged herein. Contrary to the demands of the Thirteenth Amendment, the court below would interpret Title VII so as to forbid voluntary effective measures aimed at eliminating the "badges and incidents of slavery." It would make unlawful voluntary race conscious devices designed to end the overrepresentation of whites in preferred areas of employment. It would read the law so

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*/ See McDonald v. Santa Fe Transportation Co., 427 U.S. 273 (1976).

as to illegalize voluntary efforts to build a new system free of institutionalized racial discrimination which dominates employment relations in this nation.

It is the need to undo such badges and incidents of slavery which provides the basis and justification for reconciling the competing principles argued by the parties in this case. On the one hand, all people have the right not to be discriminated against on the basis of race. On the other hand, this nation is constitutionally committed to eliminating all the present effects of this nation's all too recent history of slavery and white supremacy. To achieve this end, petitioners and others like them must be permitted to use race in affirmative ways.

If respondents' Title VII rights prevailed in this instance, the Court would be interpreting that statute in a manner which would defeat rather than effectuate the

Thirteenth Amendment. Such an interpretation, amici contend, cannot be constitutional and should be immediately repudiated.

II. IN ORDER TO EFFECTUATE THE MANDATES OF THE THIRTEENTH AMENDMENT, ADMISSION OR PROOF OF PAST UNLAWFUL OR ARGUABLY UNLAWFUL CONDUCT SHOULD NOT BE REQUIRED AS A PRE-CONDITION FOR VOLUNTARY AFFIRMATIVE ACTION.

This Title VII "reverse discrimination" case, in which minorities and women were not parties, vividly presents the difficulty if not impossibility of defendants meeting a standard requiring proof or admission of past civil rights violations, or proof or admission of even arguable past violations. The Court cannot delude itself that in cases where illegal discrimination exists, the truth will always come out. This case shows that it is more than likely that the truth will not come out.

A. The Interest Of Defendants In "Reverse Discrimination" Challenges Is To Suppress And Not To Produce Evidence Of Their Own Discriminatory Acts.

There is a "smoking gun" in this case. Petitioners, the United States of America and the Equal Employment Opportunities Commission, have filed with this Court findings made in 1971 by federal compliance officers, acting pursuant to Executive Order 11246, that craft employment practices at Kaiser's Gramercy plant did not conform with the OFCC's anti-discrimination requirements. (Government's Petition, at 18). Additional findings by federal compliance officers in 1973, state that Kaiser had waived its prior experience requirements for whites but not for Blacks who had applied for craft positions. Id. Further, those experience requirements had not been validated. (1973

findings, pp. 1-2).*/

Although the "smoking gun" was not presented to the district court, there was overwhelming evidence of its existence: the repeated testimony that Kaiser and the Union were acting to conform to the requirements of Executive Order 11246 and Title VII (Jt. Ex. No. 2, p. 13, Tr. 41, 100, 104, 106, 108, 110), the glaring statistical disparity between Blacks in the skilled jobs (2%) and Blacks in the area's labor force (39%), and the absence of evidence validating the skill experience requirements.

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*/ The failure of the parties to introduce these explosive findings of racial discrimination and noncompliance with federal requirements occurred even though the EEOC monitored the trial from its inception. Tr. 9. Indeed, were it not for the petition for certiorari to this Court, and the government's resulting decision to file these critical documents with the Court, this case might have proceeded under the illusion that there had been no past discriminatory acts by the defendants.

Despite all of this evidence and its undoubted awareness of the existence of the "smoking gun," Kaiser has insisted throughout this litigation that it was completely innocent of any wrongdoing. It has consistently attributed the statistical disparities in its craft jobs to the discriminatory acts of others. Only the Union has pressed some of these arguments of possible past violations, which it now has chosen to abandon.*/

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*/ The Union argued in the courts below that the statistics created a prima facie case of discrimination which constituted a violation of Title VII by Kaiser. Brief of Petitioner United Steelworkers of America, at 3 n. 2). However, because both lower courts found that Kaiser had not violated Title VII, the Union now cites "the two-court rule" as a reason for no longer pressing its prima facie case theory. Id. The Union waives this question of law because of reliance upon a case which dealt, not with review of a conclusion of law, but solely with a question of review of a subsidiary finding of fact. Thus the rule does not apply. Cf. Parson v. Kaiser Aluminum & Chemical Corp., 575 F. 2d 1374, 1382-3 (5th Cir. 1978). Even if the question of prior discrimination were found to be purely a question of fact, the Union failed to argue that such questions may be reviewed by this Court if the findings were clearly erroneous and/or of constitutional significance . Berenyi v. District Director, Immigration and Naturalization Service, 385 U.S. 630, 635 (1961), cf. Federal Rules of Civil Procedure 52(a).

Amici believe that both the Union and the Employer have a substantial interest by their affirmative action programs to curtail liability for past discrimination and to eliminate the badges of slavery. Nonetheless,

> ... [N]o litigant wanted to see past discrimination found. The plaintiffs knew it would weaken their case. Kaiser and the Union could only admit past discrimination by strongly inviting private suits by blacks. Although the trial below was in no way collusive, the defendants could well have realized that a victory at the cost of admitting past discrimination would be a Pyrrhic victory at best. In the district court no one represented the separate interests of the minority employees of Kaiser, the only people potentially interested in showing past discrimination. It is not surprising, therefore, that no party fully analyzed the facts within the context of Title VII. Weber v. Kaiser Aluminum & Chemical Corp. and United Steelworkers of America, AFL-CIO, 563 F. 2d 216, 231 (5th Cir. 1977) (Wisdom J., dissenting).

Reliance on such parties to marshal convincing evidence of their own misconduct which may give rise to civil liability and public criticism is wholly misplaced.

B. To Require As A Basis For Voluntary Affirmative Action, Anything More Than The Existence Of Underrepresentation, Which Has Its Roots In This Country's History Of Slavery And Its Legacy Of White Supremacy And Discrimination Against Non-White People, Is To Ensure That Virtually No Affirmative Action On A Voluntary Basis Will Take Place.

As this case convincingly demonstrates and simple logic confirms, it is entirely unrealistic to expect employers and unions to come forth with evidence satisfying the standard articulated by the majority in Weber below or that pressed by the United States. It is far more likely that employers and unions will attribute existing segregated areas to discrimination by others or to acts which, though discriminatory in result, nonetheless were entirely legal. Furthermore, in many cases such attribution will be entirely accurate.

If any standard substantially different from that advanced by amici were adopted,

the traditional victims of discrimination, Black people and other members of protected classes, would continue to suffer at the hands of employers and unions because of an entirely fallacious notion that white people were being discriminated against instead. This is the predictable practical result of a standard requiring proof of past, or even arguable past discrimination by a party against members of a protected class. This nation's aspirations to become truly "color-blind" are ill-served by a legal standard for voluntary affirmative action which gives the appearance of supporting the concept but which in reality undermines it.

To predicate relief from past discrimination on findings that most probably will not be requested or made is to effectively deny relief and to ensure that affirmative action will not be taken on a

voluntary basis. Not only would this have the effect of denying relief where it should be granted, but it has also an enormously chilling effect on future suits challenging such discrimination. If one or more courts have held that no prior discrimination exists at a given facility, few if any plaintiffs would come forward to attempt to prove such discrimination by those parties.

A standard which does not focus on underrepresentation would defeat the purpose of Title VII to promote voluntary remedial action. It would require individual case-by-case determinations in lieu of nationwide relief such as that obtained in the aluminum industry. It would enmesh the judiciary deeply in the internal functioning of business and labor, needlessly generate Title VII lawsuits and unconstitutionally chill affirmative action plans which are protected by the Thirteenth Amendment.

Any such standard, although facially proclaiming equality, would strangle true equality. It would repeat the legal fictions of the late nineteenth century, that such equality had been obtained. Indeed, it would go even further. It would create an historically unprecedented and unjustifiable new fiction that whites are being discriminated against because of affirmative action programs. Like the fiction of white superiority in Dred Scott v. Sandford, supra at 407-08 or like that of the "separate but equal" doctrine in Plessy v. Ferguson, 163 U.S. 537 (1883), a fiction of discrimination against whites aggravates racial inequality and deprives the American people of the opportunity to be educated about the tragic and massive scars caused by societal discrimination throughout our economy. Congress intended these scars to be eliminated by voluntary as well as ad-

ministratively and judicially compelled measures. Such an intent properly promotes the mandates of the Thirteenth Amendment and deserves immediate and unequivocal judicial recognition and sanction.

III. CONCLUSION

Amici file this brief to urge the Court to grant certiorari and summarily reverse the judgment of the court of appeals with instructions to the district court to dismiss the case. Amici are aware that the constitutional principles and factual matters discussed herein were not adequately addressed below. Therefore, should the Court believe that these important issues require fuller argument, amici would urge the Court to grant certiorari and direct the parties to address the question of the effect of the Thirteenth Amendment on the lawfulness of voluntary affirmative action programs.

Respectfully submitted,

ELIZABETH A. RODGERS
Shubow, Stahlin & Bergstresser, Inc.
294 Washington Street
Boston, Massachusetts 02108

JEANNE MIRER
Center for Urban Law
Wayne County Neighborhood Legal Services
3550 Cadillac Tower
Detroit, Michigan 48226

VICTOR GOODE
Affirmative Action Coordinating Center
c/o National Conference of Black Lawyers
126 West 119th Street
New York, New York 10026

JACK P. HARTOG
National Lawyers Guild
853 Broadway, Suite 1705
New York, New York 10003

ARTHUR KINOY
DORIS PETERSON
c/o Center for Constitutional Rights
853 Broadway, Suite 1401
New York, New York 10003
(212) 674-3303

Attorneys for Amici Curiae